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No. 522

In the

Supreme Court of the United States

OCTOBER TERM, 1961

AMERICAN EMPLOYERS INSURANCE COMPANY,
Petitioner,

v.

JOHN ZABLOSKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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American Employers Insurance Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in its cause number 18,550 on the 30th day of June, 1961 and finalized on the 14th day of September, 1961, by the overruling of a petition for rehearing filed by the petitioner.

OPINIONS BELOW

No opinion was rendered by the United States District Court for the Northern District of Texas. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in the Federal Reporter, Second Series, at 292 Federal Second 412 and is appended hereto as Appendix A (pp. 29 to 34).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on the 30th day of June, 1961 (Appendix B, p. 35. A Petition for Rehearing was denied on the 14th day of September, 1961 (Appendix C, p. 37). The jurisdiction of this Court is invoked under *28 U. S. C., sec. 1254.*

QUESTIONS PRESENTED

The judgments of the District Court and the Court of Appeals held that petitioner was required to pay a judgment obtained by respondent in a State Court against certain persons alleged to be insureds under a policy of automobile liability insurance. The following questions are presented to this Court:

1.

Whether the Court of Appeals erroneously applied the provisions of the Motor Vehicle Certificate of Title Act of the State of Texas on the question of true ownership of the Motor Vehicle involved in conflict with the applicable inter-

pretations of that law as espoused by the Supreme Court of Texas, thereby denying to the petitioner its right of property.

2.

Whether the Court of Appeals erroneously failed to give effect to the plain language of the insurance policy in question in conflict with the decisions of the highest court of the State of Texas, the Supreme Court of Texas.

STATUTE INVOLVED

Artitcle 1436-1, Texas Penal Code, identified as Motor Vehicle Certificate of Title Act, is the Statute involved in this litigation to be given effect. It is found at volume 3, Vernon's Texas Penal Code, pages 364 to 379. Because the statute is volumious it is set out verbatim in Appendix D (pp. 39 to 67). This statute provides generally for the registration of every kind of motor driven or propelled vehicle so as to lessen and prevent the theft of motor vehicles and house trailers and the importation into the State of Texas of and, traffic in, stolen motor vehicles and house trailers and the sale of encumbered motor vehicles and house trailers without enforced disclosure to the purchaser of any and all liens for which any such motor vehicle and house trailer stands as security. The effect, if any, of this statute upon the question of who was the true owner of the vehicle in question is here involved.

The only applicable decisions of the Supreme Court of Texas on the questions here presented are *Empire Gas and*

Fuel Company v. Muegge, 135 Tex. 520, 143 S. W. 2d 763 (Commission of Appeals, opinion adopted by S. Ct. Tex. 1940), appended as Appendix E (pp. 69 to 85), and *Pioneer Mutual Compensation Company v. Diaz, 142 Tex. 184, 177 S. W. 2d 202 (S. Ct. Tex. 1944)*, appended as Appendix F (pp. 87 to 93), as previously recognized by the United States Court of Appeals, Fifth Circuit, in *United States Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit)*, appended as Appendix G (pp. 95 to 97). These decisions show the effect given to the statute under the substantive law of the State of Texas on the questions here presented.

STATEMENT OF THE CASE

1. The Jurisdiction of the United States District Court.

This is a suit originally brought by the respondent, John Zablosky, against petitioner, American Employers Insurance Company, in the District Court of Dallas County, Texas. The case was removed to the United States District Court for the Northern District of Texas, Dallas Division, by the petitioner American Employers Insurance Company on the basis of diversity of citizenship and the United States District Court maintained jurisdiction on that basis.

2. The Issues in the Courts Below and How Joined.

This suit was brought by the respondent to recover from the petitioner upon a policy of automobile liability insurance the amount of a judgment obtained in 1954 against Roy Alvin Tucker and H. L. Flynt in the District Court of Van Zandt County, Texas.

The respondent has maintained in the proceedings below that Roy Alvin Tucker and H. L. Flynt were insured under a fleet type policy of automobile liability insurance issued by American Employers Insurance Company to B. F. Schoeneman, d/b/a Midwest Contracting Company and various other enterprises. (The policy appears at pages 188 to 228 of the Transcript.) The basic claim made by the respondent is to the effect that B. F. Schoeneman, d/b/a Midwest Contracting Company, because of the effect of the Motor Vehicle Certificate of Title Act of Texas, was the true owner of the vehicle involved in the collision which was the subject of the Van Zandt county, Texas litigation, that H. L. Flynt was operating the vehicle through his employee, Roy Alvin Tucker, with the permission and consent of B. F. Schoeneman, d/b/a Midwest Contracting Company. The respondent asserted that because B. F. Schoeneman, d/b/a Midwest Contracting Company was the owner of the vehicle in question and because the vehicle was being operated with his permission and consent, the policy of insurance in question became effective to cover H. L. Flynt and Roy Alvin Tucker in the accident because of the so-called "Omnibus clause" of the policy. Respondent also asserted that the conditions precedent to bringing suit under the policy had been complied with prior to the filing of this litigation which was tried in the United States District Court. Other issues were urged by the respondent in the trial court but did not form the basis for the judgment in the case nor were the issues considered by the United States Court of Appeals.

The issue of ownership of the vehicle in question was raised by an offering into evidence by the respondent of a certified copy of the title history showing the registered owner under the Motor Vehicle Certificate of Title Act to be Midwest Contracting Company (Tr. 241, 242), a copy of the registration records (Tr. 243, 244), showing Midwest Contracting Company as the record owner during the year in question, a copy of the conditional sales contract from Bankston-Hall Motors, Inc. to Midwest Contracting Company (Tr. 284, 285), and a copy of the certificate of title to the motor vehicle in question showing the registered owner as Midwest Contracting Company (Tr. 286). Thus the effect of the Texas Motor Vehicle Certificate of Title Act is invoked.

The petitioner, through respondent's and its own witnesses offered positive undisputed proof to the effect that while the vehicle was registered in the name of Midwest Contracting Company, an enterprise of B. F. Schoeneman, the true owner was in fact H. L. Flynt, and that the purchase arrangement was made by H. L. Flynt with B. F. Schoeneman whereby the record title would be taken in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, as a mere financing arrangement to permit H. L. Flynt to purchase the vehicle for his sole use and benefit to be utilized in his business, a long-haul trucking business; that H. L. Flynt had the responsibility of maintenance and upkeep and care of the vehicle in general, that he had to answer to no one for its use or maintenance; that all income secured through the operation of the vehicle belonged to H. L. Flynt; that B. F. Schoeneman had no real interest in the vehicle and merely permitted his name to be used as a financial accommodation as to H. L. Flynt.

In the District Court and in the Court of Appeals the petitioner asserted that under the facts presented to the Courts the application of the Motor Vehicle Certificate of Title Act did not determine true ownership and under the recognized law as applied by the Supreme Court of Texas, the true owner was H. L. Flynt, and therefore the omnibus clause of the insurance policy did not operate to insure H. L. Flynt and Roy Alvin Tucker, and the claim of the respondent should fail.

The District Court made a determination that the facts on the question of true ownership of the vehicle were in dispute and submitted the issue of true ownership to the jury for determination. The United States Court of Appeals for the Fifth Circuit agreed that a jury issue existed and affirmed the judgment of the trial court founded upon the jury verdict.

3. Facts Adduced Upon the Trial.

The facts before the trial court and reviewed by the Court of Appeals are simple and undisputed:

In December of 1952, a man by the name of H. L. Flynt who operated a trucking business was desirous of purchasing for his use a tractor unit, the unit to be operated in the trucking business itself (Tr. 91-93). The desired vehicle in question was located at Bankston-Hall Motors in Dallas, Texas, by H. L. Flynt, and negotiations towards a purchase were opened (Tr. 91-92). H. L. Flynt could not make the required down payment on the equipment, and it was impossible for him to finance the truck on a 100 percent basis through Bankston-

Hall Motors thus making it impossible for H. L. Flynt to complete the transaction (Tr. 93).

At this point B. F. Schoeneman, d/b/a Midwest Contracting Company, was brought into the picture. B. F. Schoeneman was contacted by H. L. Flynt and requested to assist the financing of the vehicle because Mr. Flynt did not have a sufficient down payment to cover the transaction (Tr. 68-69).

B. F. Schoeneman indicated that he was agreeable to taking the title to the vehicle in question into his own name or the name of Midwest Contracting Company, his wholly owned enterprise, and that he would accept the responsibility for payment in his name in order to assist H. L. Flynt to purchase the vehicle (Tr. 94, 67-70). Mr. Schoeneman did indicate that he would require H. L. Flynt to pay to him each month one and one half times the normal monthly payment in order that the vehicle would not be carried on the books of the Midwest Contracting Company for too lengthy a period of time (Tr. 69). Also at this point it was indicated that Mr. Schoeneman would expect some priority in treatment where his company needed goods hauled by Mr. Flynt with this or any other vehicle (Tr. 94, 97, 75-77). Respondent's own witness B. F. Schoeneman recited the arrangement, as follows:

> "Q. Now with regard to this 1952 Ford Truck, did you send Mr. Flynt to look for a truck or to look for a truck to buy for either himself or for you?
>
> "A. No, sir.
>
> "Q. Then I take it you did not need the new truck at the time that this one was purchased?
>
> "A. No, sir.

"Q. Mr. Schoeneman, what was the first knowledge that you had of Flynt's need for a truck or desire to purchase one?

"A. When he telephoned me from Bankston Hall Motor Company saying—telling me that he was down there trying to buy a Ford truck, that he needed another truck.

"Q. All right, sir. What was the purpose of this call to you, Mr. Schoeneman?

"A. He told me that he was not able to finance the transaction himself because he did not have a tradein or the down payment on the truck.

"Q. All right, sir. Did he request of you assistance in financing the truck in some fashion?

"A. Yes, sir.

"Q. Was an agreement reached between you and Mr. Flynt as to the method of helping him buy this truck?

"A. Yes, sir.

"Q. And would you explain to us what the arrangement was that was made between you and Mr. Flynt?

"A. I just told him that he could put the truck in our name. Bankston Hall had told him that they would sell it to him on the terms that they had agreed, over the period of time they had agreed. that he could put it in our name and that I agreed to it over the telephone, he telling me that he would make the payments as required to us.

"Q. All right, sir. Did you have some kind of arrangement with him, oral arrangement, that he was supposed to try to pay you either through work or money more per month than he actually was to have paid in the way of monthly payments?

"A. Since I told him that we were not in the financing business and I didn't want to extend it over that period of time, as far as his obligation to us was concerned. I

asked him to make a payment and a half each month if he could to get ahead of it.

"Q. And the payments that were to be made, incidentally, to the financing company included his fire and collision policy that has been—

"A. Yes, sir. I didn't know anything about the fire and collision policy. We didn't place it on there. It was placed on there by the finance company that handled it for Bankston Hall.

"Q. All right, sir.

"A. It was included in the payments. All I knew was the total amount of payments.

"Q. Your agreement with Mr. Flynt was that he was to eventually pay you the total amount of the payments, is right?

"A. He was to pay us the total amount of the payments.

"Q. And you, in turn, paid the financing company that worked through Bankston Hall?

"A. Yes, sir.

"Q. Now, Mr. Schoeneman, at that time, did you—or at any other time—go down and look at and examine the truck or have anyone connected with Midwest do so?

"A. No, sir.

"Q. As far as you were concerned, the truck was sight unseen?

"A. That is right.

"Q. All right, sir. And the papers that you executed, do you remember where they were signed?

"A. They were brought out to our office by Flynt, and after looking them over, I signed them and carried them on back.

"Q. All right, sir. Was the truck delivered to you?

"A. No, sir. I never saw the truck for a long time after that.

"Q. The truck, then, was turned over to Mr. Flynt?

"A. Yes sir.

"Q. Was there any consideration or any understanding between you and Mr. Flynt as to any control over the vehicle?

"A. None whatsoever.

"Q. You did not attempt to exercise any control over the vehicle then?

"A. Never.

"Q. Who took care of the maintenance, insofar as you know?

"A. Well, he did. If it was maintained, he did it.

"Q. You did not take care of the maintenance?

"A. No, sir.

"Q. Or your company?

"A. No, sir.

"Q. You did not purchase the oil or gas for its use, then?

"A. No, sir.

"Q. And when Mr. Flynt did hauling for you or for Midwest and used this truck or any other, you paid him by the foot on hauling pipe, did you not?

"A. Yes, sir, mostly—to my knowledge, that is the only way it was paid.

"Q. And if he hauled heavy machinery or something, you paid him for it by the load is that right?

"A. Yes, sir.

"Q. Did you at any time hire any drivers to be used in this or any other truck for Flynt?

"A. No, sir, I didn't know the drivers." (Tr. 68-71.)

The agreement having been reached by all parties the papers were prepared, including title and registration in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, and a Conditional Sales Contract with a Promissory Note attached thereto was brought to B. F. Schoeneman and executed by him as a favor to H. L. Flynt as already pointed out (Tr. 58, 59, 70).

B. F. Schoeneman did not see the vehicle in question nor did he have anything to do with the actual selection of the vehicle or any transaction connected with its purchase except as outlined above (Tr. 70). H. L. Flynt took immediate possession of the truck (Tr. 96, 66, 70) and used it in his business as a contract hauler, agreeing as already mentioned to give B. F. Schoeneman preferential treatment in use of the vehicle (hauling loads for Midwest Contracting Company in preference to other contractors where a conflict in scheduling arose) (Tr. 94-97, 75-77, 79).

At this point it should be noted that actually the payments by H. L. Flynt to B. F. Schoeneman, to extinguish the indebedness, were made in the form of hauling work, no cash ever being passed in the transaction (Tr. 107-108). Credits were accumulated on the books of B. F. Schoeneman in the name of H. L. Flynt until such time as the transaction could be written off at which time bookkeeping entries were made and the matter disposed of (Tr. 77-78).

H. L. Flynt was paid or credited for work when he did hauling for B. F. Schoeneman by the foot per mile haul, or on a per load basis, depending upon whether the load hauled was pipe or heavy equipment (Tr. 95). H. L. Flynt had his own drivers paying said drivers himself to drive the vehicle in question and did not utilize any of B. F. Schoeneman's employees (Tr. 96-97). Mr. Schoeneman had no interest in the hiring or firing of drivers handling any of Flynt's trucks including the one in question herein. As a matter of practice H. L. Flynt furnished the vehicle in question with gasoline and oil and made all the necessary repairs and generally took care of the maintenance in connection with the vehicle in question (Tr. 96). Mr. Schoeneman furnished nothing in connection with the maintenance and upkeep of the vehicle (Tr. 70). Mr. Flynt utilized the vehicle in question in his business, collecting the monies charged for the use thereof (Tr. 95).

At the time of the accident which is made the basis of the suit the truck in question was being driven by one of H. L. Flynt's employees on a mission for Mr. Flynt to haul a load for a firm which had no connection with B. F. Schoeneman (Tr. 15, 114, 116-117, 129).

Each year the vehicle was registered in the name of Midwest Contracting Company by H. L. Flynt and after the initial registration Mr. Flynt gave his own Ennis, Texas, address as the address on the registration (Tr. 98). Each year Mr. Flynt paid for the yearly registration himself (Tr. 98).

B. F. Schoeneman carried the transaction on the books of his company, Midwest Contracting Company, to conclusion

(Tr. 153-170, 171-175), but he did not carry the equipment as owned equipment nor did he deperceiate it in his business each year as he did the equipment owned by his company, or himself (Tr. 156).

B. F. Schoeneman, doing business as various proprietorships including Midwest Contracting Company, purchased a so-called Fleet Policy of insurance to cover the various vehicles which he owned, operated or leased or had some connection with in varying capacities. (The policy appears at Tr. 188-288.) The vehicle in question was listed on the policy as "Owned by H. L. Flynt and leased to insured." (Tr. 207.) The policy of insurance also contained an endorsement, dated December 28, 1952, reading:

> "Title to the 1952 Ford Truck * * * is vested in the name of B. F. Schoeneman, d/b/a Midwest Contracting Company, however, said automobile has been sold under a conditional agreement to H. L. Flynt. It is agreed that for interpretation of coverage under the policy H. L. Flynt shall be considered to be the owner of said automobile." (Tr. 222.)

During the trial of the case the agent who wrote the policy of insurance for the appellant testified that he knew of the particular transaction in connection with the vehicle in question. He testified that B. F. Schoeneman desired to have protection for the Schoeneman interests only:

> "Q. All right, sir. In caring for his insurance needs and desires, have you or not discussed from time to time with him and his office personnel various problems that arise in his needs and desires as far as insurance is concerned?
>
> "A. Many of them.

"Q. With regard to this particular 1952 Ford truck, did you discuss that situation with some of them?

"A. I am sure I did.

"Q. And in that connection, do you know what kind of coverage or what kind of protection was desired or did you discuss it?

"A. Our only interest in discussion was how was it best to protect the Schoeneman interest.

"Q. And did you attempt to do that?

"A. That is the intent in this contract." (Tr. 135.)

It was testified by the witness that B. F. Schoeneman instructed the insurance agent to do whatever was necessary to give him protection (Tr. 135). B. F. Schoeneman also testified to the same transaction advising that he left it up to his insurance agent, in this instance Ellis-Smith & Company, to determine the specific coverage that was needed under the circumstances, but that it was his desire to obtain protection for himself in the event that there was a need for him to be protected because of the peculiar transaction surrounding the purchase of the vehicle by H. L. Flynt:

"Q. Mr. Schoeneman, did you also have the Ford truck put on your public liability policy?

"A. I don't know how it was carried on the liability policy.

"Q. My question was not how it was carried, but did you have it put on there?

"A. I instructed my secretary to call our agent and explain the transaction to him that had been made and asked him to protect us." (Tr. 64.)

"Q. Now, Mr. Schoeneman, you mentioned a while ago that you instructed your secretary or bookkeeper to

get in touch with your agent, your insurance agent, and explain the circumstances to him and let him know you wanted to protected, is that right?

"A. That is right.

"Q. Did you, at any time, attempt to make a purchase of any insurance policy for H. L. Flynt or Roy Alvin Tucker?

"A. No sir.

"Q. Have you at any time attempted to buy any sort of insurance protection for and on behalf of either of those men?

"A. No, sir." (Tr. 73.)

It is upon this basis that the vehicle was added to the policy in question, the premium being on a specified car basis, the same cost in dollars and cents as the premium for an owned automobile. (Tr. 137-138.)

Respondent's own witness, J. H. Albright, engaged in the insurance business, made it clear as to why this was so, saying the registration of the vehicle alone caused it:

"Q. Mr. Abright, in other words, regardless of the true ownership of the vehicle, if a vehicle were registered in the name of the insured, in this case the agent would just charge the specified car basis?

"A. That is right. He couldn't write it as a hired automobile if it is registered in the name of the assured.

"Q. And is the ownership registration what causes it?

"A. The ownership or registration.

"Q. And it does not have anything to do with whether or not the insured is the true owner: it is that he is the

registered owner that requires it to be the specified car basis?

"A. I would think that to be true." (Tr. 84.)

This witness further indicated that the policy before the court had not been questioned by the Insurance Department of Texas as to the correct premiums under the endorsements previously quoted with regard to true ownership (Tr. 88). And the matter of the department's specific approval was evidenced by a letter to the insurer offered into evidence (Tr. 148 ff), the instrument itself appearing in the transcript at pages 298-299.

The express intent of the insurance carrier and the insured who was paying the premium was to provide protection to the insured who was paying premium in the event he was in some way exposed to liability. The policy itself issued by the insurance company, petitioner, through the agent, Ellis-Smith & Company, to B. F. Schoeneman contained express language to the effect that all parties acknowledged the particular transaction and the true ownership of the vehicle is H. L. Flynt.

These policy endorsements were not something added by the petitioner after the policy had run its course merely to defeat the respondent in this case. These endorsements were added long prior to the accident and at the agreement of the parties to the contract of insurance to reflect correctly their understanding as to the real ownership status of the vehicle. The agreement to purchase and sell insurance and what was to be insured was of long standing in December of 1953 when the accident occurred. This the record makes abundantly clear.

Both H. L. Flynt and B. F. Schoeneman testified in unanimity to the actual ownership of the vehicle in H. L. Flynt and not B. F. Schoeneman and that there never was any intention at any time for B. F. Schoeneman either to own, control, or otherwise exert any ownership activity in connection with the use of the vehicle in question.

In the Van Zandt County litigation made the basis of this suit, B. F. Schoeneman was one of the original defendants and in accordance with its obligation to B. F. Schoeneman, the petitioner entered an appearance for him and defended him in the litigation until he was dismissed from the suit prior to judgment being taken by the respondent against H. L. Flynt and Roy Alvin Tucker for $100,000.00, plus costs and interest. (Tr. 73-74.)

REASONS FOR GRANTING THE WRIT

1.

Important rights of property are in question in this case which rights are and should be established under state law. Whether the Court of Appeals has destroyed those rights of property resting in the petitioner by ignoring the state law involved is a question of considerable importance and should be reviewed by this court.

Judgment was rendered against the petitioner by the United States District Court and affirmed by the Court of Appeals which judgment was written contrary to the law of the State of Texas as outlined by the Supreme Court of Texas. The question raised is one of considerable impor-

tance because by departing sharply from the decisions of the State Supreme Court, the Federal Courts determining this case have set up a body of substantive law applicable in the Federal Court but not recognized as valid in the State Court under which substantive law certain policies of liability insurance approved by the State Insurance Commission are to be construed particularly where the question of ownership of a motor vehicle and property rights affected thereby is involved. To permit the decision of the United States Court of Appeals in this case to stand will permit this second standard to remain effective in direct conflict with the recognized state law.

The United States Court of Appeals for the Fifth Circuit not only has departed from the convention of state law but has rendered a decision in conflict with its own decision in the earlier case of *United Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit).*

The obligation of the court to determine the true ownership of a motor vehicle regardless of the manner in which the vehicle is registered under the Motor Vehicle Certificate of Title Act is not at all a new question in Texas. There are two basic decisions, one rendered in 1940 and one rendered in 1944, both of which were ignored both by the District Court and the Court of Appeals in rendering a decision in this case. The case of *Empire Gas and Fuel Company v. Muegge, 143 S. W. 2d 763 (Com of Appeals, 1940, adopted S. Ct. Tex.)*, was the first decision announced by the Supreme Court of Texas construing the Certificate of Title Act as it affected the true ownership of a registered motor

vehicle. The Supreme Court held that the registration of a particular vehicle in the name of a particular individual or company under the Certificate of Title Act raised an administrative presumption to the effect that such person or company was the true owner of the registered vehicle. The Supreme Court of Texas also held that if this presumption was left standing alone, it would be sufficient to sustain a finding of ownership in the named individual in the certificate. The Supreme Court of Texas held, however, that this being a true administrative presumption, it was not evidence under Texas law but only a procedural thing and when met by rebutting proof it was not to be weighed by the jury or treated by the jury or the court as any evidence in arriving at a verdict or decision on the question of true ownership. The Supreme Court of Texas through its commissioner stated:

> "It follows that the presumption as to the ownership of the truck arising from the registration and presumption as to its use in transporting the ditching machine arising from the permit are not to be regarded as having raised an issue or issues of fact for the jury's determination if such presumptions are met by positive rebutting proof."

The Supreme Court of Texas held that the administrative presumption is conclusively overcome by clear, positive and undisputed evidence.

In 1944, the Supreme Court of Texas reiterated its position and affirmed the previous decision concerning the same question in *Pioneer Mutual Compensation Company v. Diaz, 177 S. W. 2d 202 (S. Ct. Tex., 1944)*. The court

again said that the registration of the motor vehicle raised the presumption of ownership but such presumption was not evidence but an administrative presumption which vanished when positive evidence to the contrary is introduced into the trial.

Under the decisions as outlined by the Supreme Court of Texas there was raised in this case an administrative presumption to the effect that B. F. Schoeneman was the true owner of the vehicle in question. There also was clear, positive, rebutting proof to the effect that H. L. Flynt and not B. F. Schoeneman was the true owner of the vehicle in question, and there was not offered in rebuttal any proof to the contrary to conflict with the evidence of an undisputed nature establishing true ownership in H. L. Flynt.

It is here that the District Court gave lip service to the decisions of the Texas Supreme Court but literally turned its back upon those decisions in refusing to determine an issue of law but instead submitted it to a jury for determination and permitted that jury in direct conflict with the decisions of the Texas Supreme Court to consider the registration of the vehicle in question in the name of B. F. Schoeneman d/b/a Midwest Contracting Company as a part of the evidence in the case, and rendered judgment on a verdict which as a matter of law ran contrary to the decision of the Texas Supreme Court.

The Court of Appeals also refusing to recognize its obligations to decide the case in accordance with the decisions of the Texas Supreme Court nevertheless recited the evidence in its opinion which was clear, positive, and undisputed and

rebutting the administrative presumption, and then turning its judicial head aside so as to blind itself to the state law affirmed the judgment. By so doing, the Court of Appeals turned its back upon the decisions of the Texas Supreme Court and in effect, created a standard of substantive law wholly foreign to the decisions of the Supreme Court of Texas which decisions should be controlling on issues submitted in the trial and in the appellate procedures before the Federal Courts in this case.

Not only did the Court of Appeals turn its back upon the decisions of the Texas Supreme Court, it also turned its back upon its own decision earlier rendered in *United States Casualty Company v. Ohio Casualty Insurance Company, 208 Fed. 2d 451 (Fifth Circuit).*

In order to arrive at a decision, the Court of Appeals not only had to ignore the case law espoused by the Supreme Court of Texas but also had to sanction a rather unusual departure from accepted and ordinary rules of evidence recognized not only in the State Courts but also in the Federal Courts. An examination of the record will disclose that B. F. Schoeneman was called as a witness by the respondent and his testimony which contained positive, clear and rebutting evidence to the administrative presumption was offered after B. F. Schoeneman had been presented to the Court as a witness for the respondent and his truth and veracity had been admitted by the respondent by his presentation to the Court. The testimony of B. F. Schoeneman and the testimony of H. L. Flynt, a witness for the petitioner, was nowhere in conflict on the question of true ownership and the testimony of these two

men was the only evidence offered by either side on the basic question of true ownership for consideration by the court. In order to arrive at a decision that a jury question was presented the court of appeals had to ignore the fact that the testimony of B. F. Schoeneman was offered as the testimony of the witness of the respondent, and allow the respondent to ignore the effect of his own witness when respondent was attempting to prevail upon a judgment obviously not predicated on the undisputed testimony of this, his own witness. The petitioner submits this is the rankest departure from the ordinary rules and in itself is sufficient to invoke a hearing before this court.

2.

Not only did the Court of Appeals go to great length to ignore the decisions of the Supreme Court of Texas on the basic question involved, that of true ownership of the vehicle in question, but also ignored additional decisions of the Texas Supreme Court governing the interpretation of insurance policies in effect at the sufferance of the state legislature and administrative bodies.

As recognized in the opinion of the Court of Appeals the policy in question contained an endorsement, which endorsement contained the statement:

> "Owned by H. L. Flynt and leased to the insured"

and contained a further endorsement which provided:

> "Title to the 1952 Ford truck * * * is vested in the name of B. F. Schoeneman, d b a Midwest Contracting Company, however, said automobile had been sold under a conditional agreement to H. L. Flynt. It is agreed that

> for interpretation and coverage under the policy H. L. Flynt shall be considered to be the owner of said automobile."

Transport Insurance Company v. Standard Oil Company of Texas, 337 S. W. 2d 284 (S. C. Tex. 1960), clearly stated the requirements of the Supreme Court of Texas that an insurance policy just as any other contract is to be interpreted to effectuate the intention of the parties to the contract as expressed by the words used. The policy before the Court in this case clearly set out the intention of the parties on the question of ownership and yet in spite of the requirement of the Supreme Court of Texas that this intention be carried out, the Court of Appeals ignored not only the express language of policy, but also the express law of the State as espoused by the Texas Supreme Court which would require an effectuation of the obvious intention of the parties on the question of ownership.

Again the Court of Appeals for the Fifth Circuit ignored its own previous decision in *American Fidelity and Casualty Company, Inc. v. St. Paul Mercury Indemnity Company, 248 Fed. 2d 409 (Fifth Circuit, 1957)*, in which opinion the Court had said:

> "Adhering to the traditional view that as between insurer and assured, terms of doubtful, double or inviguous meaning are to be liberally construed * * * *insurance policies, as any other contract, are to be interpreted to effectuate the intention of the parties as expressed by the words used.*" (Emphasis added.)

Thus, in judicial deafness the Court of Appeals was not able to hear the requirements of the Supreme Court of Texas not only on the basic question of ownership of the vehicle

involved, but also on the requirement that effect be given to the obvious express intention of the parties to the contract.

It, therefore, is submitted that the Court of Appeals has so ignored the substantive law of the State of Texas in this case on a question of considerable importance in the field of public liability insurance and in addition thereto has so failed to follow normal accepted rules of evidence that the Supreme Court of the United States should grant a writ of certiorari as prayed for herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE UPON ADVERSE PARTY

This is to certify that simultaneous with the filing of this Petition for Writ of Certiorari a true copy was forwarded to each counsel of record for the respondent by ordinary United States Mail properly addressed, postage prepaid.

JAMES A. WILLIAMS,
Attorney for Petitioner.